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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-538

CITY OF DETROIT,
a Michigan Municipal Corporation,
Petitioner-Plaintiff,

vs.

GARMENT CORPORATION OF AMERICA,
a Michigan Corporation,
Respondent-Defendant.

BRIEF OF RESPONDENT GARMENT CORPORATION OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HONIGMAN MILLER SCHWARTZ
and COHN
2290 First National Building
Detroit, Michigan 48226
962-6700
Attorneys for Respondent

JOHN SKLAR
Of Counsel

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8795—WO. 2-8732

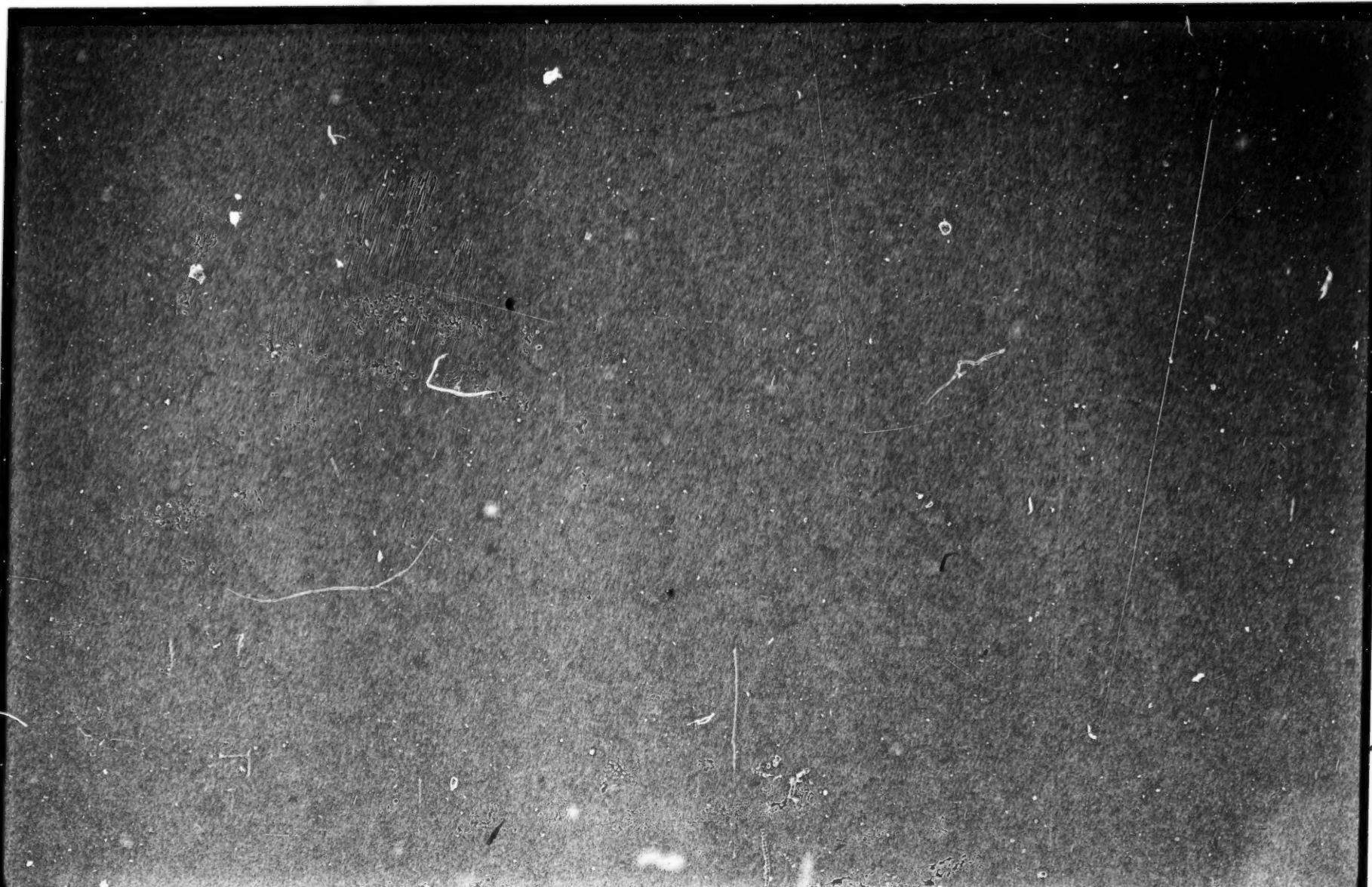


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BRIEF OF RESPONDENT GARMENT CORPORATION OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF ISSUES FOR REVIEW

Where imported merchandise is bulk-packed by the foreign manufacturer in large sealed cartons which are then delivered to a public carrier for transportation to the importer, does the trailer or van of the carrier become the "original package" of the exporter, and does the mere unloading of the cartons from such vans constitute a "breaking" of the original package?

A. Does the mere unloading and warehousing of such cartons by the importer, unopened and intact, change their nature and status as imports protected from local taxation by Article I, Section 10, of the Constitution of the United States?

The lower court said "no" to both questions. Respondent says this was correct.

COUNTER-STATEMENT OF CASE

The controlling facts herein are undisputed and were succinctly set forth in the decision of the Michigan Court of Appeals, Appendix A, pp. 1a-5a (32 Mich. App. 715, 189 N.W. 2d 72 (1971), app. den., July 19, 1971, 385 Mich. 770).

Petitioner's statement is not, however, wholly accurate, and some clarification is, we believe, desirable. Thus, petitioner (page 3) refers to the exporter's cartons as being "at rest" in respondent's place of storage, "awaiting sale to local customers". The fact is, as the lower court noted, that respondent is a national jobber of work garments; and it was undisputed below that these bulk-packed exporter's cartons were stored, unopened and unaltered, in a segregated area of respondent's warehouse pending resale and reshipment generally, to any purchaser wherever located. Accordingly, the undisputed facts herein may be more accurately summarized as follows:

Respondent, a jobber nationally of industrial garments, imports much of these from Puerto Rico. The garments in question are work shirts and pants, which were packaged by the Puerto Rico manufacturer in large cartons, each containing quantities ranging from 5 dozen pants to 10 or 12 dozen shirts and sealed with heavy sealing tape rein-

forced by special bands. These cartons are shipped to respondent, sometimes by air but most often by the Sea-Land or Sea-Train public carrier companies. The latter utilize trailers, generally with detachable or retractable wheels for more efficient stacking on board ship, during the overseas portion of their travel. Upon arrival at port of entry the trailers are landed, the wheels reattached and the trailers or vans are brought to the consignee's warehouse. The vans may be TL (total load) vans wherein respondent's cartons are the entire cargo, or LTL (less than total load) or mixed load vans, wherein respondent's cartons are transported together with the merchandise of others. It was estimated by respondent at the hearing below that of the total cartons imported in 1968 (the 1969 assessment here in question was predicated on personalty on hand as at December 31, 1968, the statutory assessment date), approximately 31% was received in TL (total load) vans, the remainder having been transported in shared load vans containing consignments to others.

The vans or trailers are, of course, at all times the property of the carrier. Upon arrival at respondent's warehouse in Detroit the subject cartons were unloaded and stored, unopened and unaltered in any way, in a segregated portion of the importer's (respondent's) warehouse, pending resale and reshipment.

In the court below it was the position of both petitioner City (see its brief below, p. 2) and the State Tax Commission (its brief below, p. 17) that the cartons of merchandise retained their character as "original packages", and therefore as non-taxable imports when the carrier's van also contains the imports of others, but not when it contained only the cartons consigned to respondent. In the latter instances they argued that the public carrier's van had become the "original package", notwithstanding

that the original cartons were being transported therein; and that the unloading of the cartons at the importer's warehouse was a "breaking" of the "original package" which *ipso facto* destroyed the constitutional immunity of the imported merchandise from local taxation.

Although it was the ruling of the State Tax Commission which was reversed in the court below (wherein the State Tax Commission through the Michigan Attorney General appeared and submitted briefs) the present petition of the City of Detroit indicates that the State Tax Commission has declined to join in the request for issuance of certiorari by this Court.

As to reasons for granting the writ, petitioner asserts the existence (pp. 7, 9) of "pending litigation in this and other states" and "conflicting" judicial views. However, we know of no other case involving the instant issue, nor of any conflict of authorities on either like—or even comparable—facts.

ARGUMENT

I.

IMPORTED MERCHANDISE HELD IN STORAGE IN ITS ORIGINAL FORM FOR RESALE BY THE IMPORTER IS CONSTITUTIONALLY PROTECTED AGAINST LOCAL TAXATION

Imports held in storage for resale by the importer in the original form in which imported, are constitutionally immune from local taxation. Article I, Section 10 of the United States Constitution declares:

> "No State shall, without the consent of Congress, lay Imposts or Duties on imports or exports . . . ".

Since petitioner's entire argument is predicated on its concept of the so-called "original package" doctrine, it should be noted that the constitutional prohibition is addressed to taxes upon "imports", not "packages", and nowhere speaks in terms of "original, unopened package". The "original package" reference first appeared in *Brown v. Maryland,* 12 Wheat (U.S.) 419, 6th L.ed 678 (1827) merely as an example or illustration which could indicate whether the import had in fact been so acted upon, altered, or commingled with the common mass of property within the State, as to lose its distinctive characteristic as an import. The Court reiterated, at page 686:

> " . . . but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

Further, at page 686:

> "The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possesses the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it."

And at p. 688:

> "Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is an essential ingredient, as indispensible to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

To like effect was the comment of Justice Frankfurter in *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 3 L. ed 2 490 (1959), page 502, footnote 1:

> "Although the principles of *Brown v. Maryland* are often termed the 'original package doctrine', Marshall was concerned with a 'package' only because the statute in that case taxed the selling of goods in their original packages. 12 Wheat at 436 and 443. Marshall himself is careful to use the phrase, 'form of package', 12 Wheat at 442, and Mr. Chief Justice Taney, in his reformulation of *Brown v. Maryland,* used the characterization 'form and shape'. See p. 506, *infra.* 'It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive, . . . *City of Galveston v. Mexican Petroleum Corp.,* 15 F. 2d 208."

The fact is, of course, that innumerable cases, both state and federal, have affirmed the immunity from taxation of imported merchandise, such as here involved, throughout the period that it is held in storage by the importer in its original form, or in the unopened cartons of the foreign shipper, and has not been committed to actual manufacturing or processing. See among others:

Brown v. Maryland, 12 Wheat. (U.S.) 419, 6 L. ed 678 (1827);

Hooven & Allison Co. v. Evatt, 324 U.S. 652, 89 L. ed 1252 (1944);

Austin v. Tennessee, 179 U.S. 343, 45 L. ed 224 (1900);

Department of Revenue v. Beam Distilling Co., 377 U.S. 341, 12 L. ed 2d 362 (1964);

City of Detroit v. Klockner, Inc., 383 Mich. 76 (1970);

City of Detroit v. Kenwall Products Corporation, 14 Mich. App. 657 (1968), appeal denied 381 Mich. 811; *certiorari denied* 396 U.S. 833;
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Florida Greenheart Corp. v. Gautier; (Fla., 1965), 172 So.2d 589, cert. den. 382 U.S. 825, 15 L. ed 2d 70;
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Simon v. County of Los Angeles, 141 Cal, App. 2d 74, 296 Pac. 2d 381 (1956);
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Philippine Refining Corp. v. Contra Costa County, (24 Cal. App. 2d 665), 76 Pac. 2d 163 (1938);
City of Galveston v. Mexican Petroleum Corp., (D.C. Tex., 1926), 15 F. 2d 208.

In most cases imports are in fact packaged by the exporter, but this is not always so, nor is this necessary

where the imports remain in their original form, unaltered, unprocessed, uncommingled with local inventory, and have not entered into any local manufacturing process. Thus, *Kenwall, Klockner*, and *Beall, supra*, involved steel coils; *Wheeling Steel, supra*, involved ores shipped in bulk; *Florida Greenheart, supra*, involved lumber; *Lake Superior Paper, supra*, involved rolls of newsprint paper; *City of Galveston, supra*, involved oil.

Here, however, the imported merchandise was in fact completely packaged by the foreign manufacturer in large sealed cases or cartons which were stored, intact, in the importer's warehouse pending resale. Those cases were the "original packages", and we submit that it is less than accurate for petitioner to avert its gaze from that uncontroverted fact, and refer to the public carrier's van as the "original package". The plain difference between mere instruments and technology of transportation and the packages of the exporter was clearly noted by the Court below (App. A, p. 4a):

> "There is no essential difference between these vans and vehicles which are normally used in the over-the-road transportation of property; the only slight difference being that they are modified to permit transportation of the entire van by ship. It can only be concluded that the vans and trailers are, in fact, vehicles, or at least instruments of transportation, and the mere use of a new technology in shipping does not destroy the tax immunity of the property shipped.
>
> • • •
>
> The use of the vans here did not go to the essential nature of the transaction, but to the formalities of transportation. To hold otherwise is to extend the scope of the laws by implication or forced construction, contrary to the established law in this jurisdiction. *Topps of Warren, Inc., v. City of Warren* (1970) 27 Mich. App. 59"

A. The "Original Package" Doctrine Refers to the Exporter's Package as Delivered to the Carrier for Transportation, not the Vehicle in Which the Package is Transported by the Carrier

As above noted, actual packaging is not the legal determinant as to the constitutional immunity of imported merchandise from local taxation. To the extent, however, that the existence of an original "package" becomes here important, the cases clearly point out that the "package" referred to is the package delivered by the shipper to the carrier for transportation. As stated in 26 ALR 971:

> "However, it may be stated that in general an original package *is that package* which, according to custom respecting the particular articles shipped, *is usually delivered by the vendor to the carrier* for transportation, and delivered as a unit to the consignee. This definition, in substance, has been stated in a number of decisions, as is illustrated by the following definitions." (emphasis supplied)

In *United States v. Sixty-Five Casks Liquid Extracts,* 170 F. Rep. 449 (1909) liquids were shipped in casks in carload lots. There, as here, the respondents contended that the car, rather than the casks, was the "original package". *Held,* that "the cask and not the car is the 'original package'."

In *Simon v. County of Los Angeles* (1956), 296 Pac. 2d 381, 141 Cal. App. 2d 74, the Court stated the applicable rule as follows (reading from syllabus):

> "TAXATION—IMPORTS—ORIGINAL PACKAGE DOCTRINE. — The fact that nails are imported from England in kegs and gunny sacks, such sacks or bags being the customary package in Europe, is strong evidence that they are original

> packages within the meaning of the law of foreign commerce, and such presumption applies where the importation is made in the usual manner prevalent among honest dealers in a *bona fide package of customary size and there is no ..idence showing a departure from normal trade operations,* so that those nails whose containers or fasteners have not been opened or removed are still in the status of imports and are not locally taxable." (emphasis added)

Similarly, in *Guckenheimer v. Sellers, supra,* the Court declared, *inter alia:*

> "An original package, within the meaning of the law of interstate commerce, is the package *delivered by the importer to the carrier at the initial point of shipment,* in the exact condition in which it was shipped." (emphasis added)

As stated by the Nebraska Court in *Ex Parte Agnew,* 89 Neb. 306, 131 N.W. 817:

> "An original package as governed by interstate commerce law *is that which is delivered by the importer to the carrier at the initial point of shipment* and retains its form and contents until received by the consignee in the same condition as when shipped." (emphasis added)

The Iowa Court likewise declared, *McGregor v. Cone,* 73 N.W. 1041, 104 Iowa 465 (1898):

> "An 'original package' within the constitutional provision respecting the regulation of commerce, is the identical package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it is shipped." (emphasis added)

Here, that "original package" was the bulk-packed sealed case or carton delivered by the foreign manufacturer to the carrier for overseas transportation.

II.

INAPPLICABILITY OF PETITIONER'S CITATIONS

Petitioner here, as in the Court below. contends that the following cases support its argument:

F. May & Co. v. New Orleans, 178 U.S. 496, 44 L. ed 1165 (1900);
E. J. Stanton & Sons v. Los Angeles County, 177 Pac. 2d 804 (1947);
American Mannex Corp. v. Cronvich, 207 So. 2d 778 (1968) (La. Sup. Ct.);
Austin v. State of Tenn., supra;
Mexican Petroleum Corp v. South Portland (1922) 121 Me 128, 115 Atl. 900, 26 ALR 965;
Askren v. Continental Oil Co., (1920) 252 US 444, 64 L. ed 654, 40 S. Ct. 355.

The lower courts deemed these cases inapplicable and, we submit, correctly so. None of petitioner's citations involved either a comparable factual situation, or any ruling that the vehicle of the public carrier rather than the exporter's cases should be declared the exporter's "original package", the mere unloading of which would destroy the constitutional protection of imports.

Thus, in *F. May & Co. v. New Orleans, supra*, the exporter used large wooden boxes or packing cases for the shipment of miscellaneous merchandise individually bundled or packaged therein. *Held*, that exporter's box, in which the smaller packages were placed by the shipper for transportation by the carrier, constituted the original package, as otherwise the importer could have even the tiniest item, such as Swiss watches, individually boxed, placed on his store shelf for sale at retail, and yet avoid taxation

thereon. Accordingly, *May* upholds, rather than refutes, the decision of the court below.

Stanton, supra, involved the taxability of a cargo of planks, timbers and logs which were not merely unloaded from the carrier but were sorted, classified and stored in bins at the *Stanton* lumber yard to facilitate local sales. Sales were in fact made from such piles or bins, and the remnants commingled with new shipments of the same type. *Held* by the court, that the imported lumber had been so acted upon as to become part of the mass of the property within the State subject to local taxation. The issue there was obviously unlike the issue here; in fact the opinion of the court in *Stanton* reiterates the basic principles applied by the lower court here.

Similarly, in *American Manufacturers, supra,* oil well casings shipped in bulk had come to rest in the dealer's retail establishment, where sales were made from the warehouse racks. *Held,* that the merchandise had come to rest as part of plaintiff's retail inventory, and had become part of the mass of merchandise within the State. *American Manufacturers* did not, as here, involve sealed cartons, held in storage by the importer in a segregated warehouse area pending resale to dealers nationally.

Austin, supra, is equally inapplicable to the case at bar. It presented the wholly different issue arising from the importer's claim that the individual retail cigarette packages (10 cigarettes to the pack), rather than the baskets or containers in which they were transported, should be deemed the original package. *Held,* that the baskets rather than the individual cigarette packs should be deemed the original package, since that represented the unit of shipment as between the manufacturer and the importer. So, here, as between manufacturer and importer, the unit

of shipment was and is the large case or carton containing work garments packed in bulk, and shipped as the units of transportation.

Mexican Petroleum, supra, involved shipment of oil, in bulk, by tanker. Because no other container was involved, the Maine Court concluded that the tanker itself was the "original package", and that such original package was broken when the oil was pumped into smaller storage tanks at the petitioner's premises, in South Portland, for local sale and delivery, the oil being there commingled with prior oil also stored in such tanks [some of the oil thus stored was also used by petitioner's branch office for its private purposes, i.e., heat and power].

Such bulk oil cases are, of course, wholly unlike the case at bar. The tanker is not only the original package or container, it is actually the *only* package or container. It does not, as here, constitute merely a vehicle of transportation for previously packed boxes or containers which are the original packages and *are* the shipper's actual box for such transportation. The Maine Court itself pointed out this distinction, declaring (page 969):

> "In our opinion, therefore, where the oil was stored and shipped in the steamer tank, the oil and tank together may be considered as the original package. *Had there been several moveable containers, as casks or barrels, there would be no contention on this point*". (Emphasis supplied)

It is noteworthy, too, that even in the wholly dissimilar factual situation of the bulk oil or tanker cases, other courts have disagreed with the reasoning of the Maine Court.

> *Philippine Refining Corporation v. Contra Costa County* (24 Cal. App. 2d 665, 76 Pac. 2d 163, 1938);

City of Galveston v. Mexican Petroleum Corporation; 15 F.2d 208 (D.C., Tex., 1926);
Mexican Petroleum Corporation v. Louisiana Tax Commission, 173 La. 604, 138 So. 117 (1931);
Florida Greenheart Corporation v. Gautier, (Florida 1965) 172 So.2d 589, *cert. den.,* 382 U.S. 825, 15 L. ed 2d 70.

Commenting on the decision of the Maine Court, the Louisiana Supreme Court declared (138 So., *supra,* at page 121):

> " . . . we are not in accord with it. It was there held, which we regard as erroneous, that the tank steamer and the oil constituted the original package, and that the withdrawal of the oil from the steamer, caused the oil to lose its character as an import. *The package and the carrier cannot be the same, for then a delivery of the oil would involve a delivery of the carrier.*" (emphasis added)

Askren, too, was a tanker case rather than a cargo of cases or boxes. *Askren* in fact was not even an import case but rather an issue arising under the interstate commerce law, which arises under a different constitutional provision and involves wholly different issues, 51 Am. Jur. pp. 136, 138, 262, *et seq.* As stated at p. 265:

> "With respect to local taxation after the transit has ended, a distinction is made between goods imported from foreign countries and those brought in from other states. Thus, as previously observed, in the case of articles imported from foreign countries, the immunity attaches to the articles themselves, and they are free from local taxation as long as they remain in the form and in the package in which imported, while a state tax upon property brought in from another state, whether it remains in the original packages or not, after it has reached

its destination or the transit has otherwise ended, and it is in a state of rest, is lawful if the tax is not discriminating in its incidence against the property because of its origin in another state."

Moreover, even in *Askren*, the Court held that as to oil brought in by interstate tankers, a privilege tax was an unlawful burden on interstate commerce, and that the tax was lawful only as to the gasoline held for local sale to customers in individual quantities as desired.

Ironically, in the court below, both the State Tax Commission and the City of Detroit expressly conceded that the instant cartons of merchandise were immune from taxation as "original packages" when transported other than by total load sea-land or sea-train trailers or by other means (Tax Commission brief, p. 17; Detroit brief, p. 2). Surely, however, if such cases or cartons remain the "original packages" when transported by other than total load vans, they do not cease to be such merely because transported by total load vans. Total load, as distinguished from partial (less than) total load vans, or mixed load vans, represent merely a difference in degree.

If petitioner may here treat the unloading of a total load van as a breaking of the exporter's original package, it may, with similar logic, hereafter treat the opening and unloading of any transportation vehicle as a breaking of the original package rendering all imported merchandise subject to local taxation immediately upon arrival, Article I, Section 10 of the Constitution to the contrary notwithstanding.

CONCLUSION

In essence, petitioner's contention is that the public carrier's vans or trailers are merely big boxes, even though on wheels; that as big boxes containing the exporter's packages, the carrier's vehicle rather than the exporter's cartons have somehow become the "original packages" of the foreign manufacturer; that therefore, the mere opening of the trailer and the unloading of the manufacturer's export cartons is a breaking of the "original package" which then and there destroys the constitutional immunity of the imports even though these have not been altered, acted upon, or changed in any way but are merely stored, unopened, and unaltered, in the importer's warehouse pending resale. These contentions, we submit, are obvious *non sequiturs*, clearly erroneous for a variety of reasons:

1. "Original package" is not, in itself, the constitutional test under Article I, Section 10, *supra*. It is merely an evidentiary device to ascertain when imported merchandise has been so acted upon, altered and commingled as to have lost its essential character as an import. Here, it is undisputed, however, that the foreign manufacturer's original, bulk-packed cases had been stored, intact, in the importer's warehouse awaiting resale to its purchasers nationally. The lower court here found (p. 720):

> "In the instant case, the merchandise did not lose its distinctive character as an import".

2. Even as a "container", the carrier's van is not the *original* package or container—an undisputed fact which petitioner's brief continues studiously to ignore. On the contrary, here the *original* package is the large shipping carton or box of the manufacturer, in which dozens of garments are packed, sealed, and delivered to the carrier.

3. A van hauled by truck, motor, or tractor is no different in principle than the freight car hauled by locomotive (or, as is daily observable on the Detroit river, transported between Detroit and Windsor by barge). Whether the vehicle be a truck van, a freight car, a steamship, or a cargo plane, all are in a sense containers with respect to the cargoes they carry. No case holds however,—and petitioner cites none—that large, bulk-packed cartons or cases, suitably sealed by a foreign shipper for overseas transportation, cease to be the *original* packages merely because they are in turn carried or enclosed in the carrier's vehicle as part of the carrier's transportation service.

4. If carried to its logical conclusion, petitioner's theory would enable local taxing entities to nullify and thwart the law of the land expressed by Article I, § 10 of the United States Constitution. Imported merchandise must, of necessity, be transported by whatever means may be appropriate, be they ship, plane, truck, trailer van, or whatever. If the mere vehicle of transportation is now to be declared the exporter's "original package", the mere unloading and storage of which *ipso facto* converts the import into taxable property, then the many decisions of this Court and of many other courts (only partially referred to herein, and in our brief below) which have declined to treat the transportation vehicle as the original package, or declare imports taxable merely by reason of their delivery to the importer would have to be overruled.

The semantic legerdemain involved in labeling the carriers' transportation vehicle as the exporter's "original package" should not obscure or disguise the actual thrust of petitioner's contention. Whatever the euphemism, whether called a breaking of an original package or otherwise, if the mere opening of the carrier's vehicle for unloading and delivery of the imported merchandise de-

stroys the constitutional immunity, then, for all practical purposes, Article I, Section 10, has been emasculated and made a dead letter.

Petitioner's theory is unsupported by any of the cases that it cites. It is contrary to the actual provision of Article I, § 10 of the Constitution of the United States, and it is contrary to all of the decisions of all of the courts which have, throughout the years, addressed themselves to this issue.

The ruling of the Michigan courts herein was clearly correct. We submit that the petition for writ of certiorari is without basis or justification in fact or in law, and should be denied.

Respectfully submitted,

HONIGMAN, MILLER,
SCHWARTZ AND COHN
By: John Sklar
Attorneys for Respondent
Garment Corporation
of America
2290 First National Building
Detroit, Michigan 48226
962-6700

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